

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 57/2007

**BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.**

BETWEEN	GOBLIN HILL HOTELS LIMITED	APPELLANT
AND	JOHN THOMPSON	1ST RESPONDENT
AND	JANET THOMPSON	2ND RESPONDENT

**Dr Lloyd Barnett and Miss Gillian Burgess, instructed by Watson & Watson,
for the appellant**

Mr Charles E. Piper for the respondents

2 March and 5 June, 2009

SMITH, J.A.:

I have read the draft judgment of Morrison, J.A. I agree with his reasoning and conclusion. There is nothing further I wish to add.

MORRISON, J.A.:

1. By order made on 19 December 2008, the appeal in this matter was allowed and judgment entered in the appellant's favour on its counterclaim for arrears of payment of assessments in the sum of \$3,658,375.05. This order was based on the evidence produced at trial by the appellant, which the trial judge accepted, showing that amount as

being the amount due from the respondents as at 22 December 2001, the date of forfeiture of their shares in the appellant, inclusive of interest to that date.

2. The parties were invited to make further submissions to this court on the question of whether the appellant was entitled to interest on that sum from 23 December 2001 to the date of judgment and, if so, on what basis. In response to this invitation, the parties very helpfully provided written submissions, which were supplemented by oral presentations at a brief sitting of the court for this purpose on 2 March 2009.

3. I will refer to the respondents' submissions first, since they challenge fundamentally the appellant's entitlement to interest at all.

4. In his written submissions, Mr Piper submitted "...that in the absence of any claim for interest in its statement of case, the appellant is not entitled to an award of interest". In support of this submission, Mr Piper relied on the decision of this court in ***Long Yong (Pte) Ltd v Forbes Manufacturing & Marketing Ltd*** (1986) 40 WIR 229, a case concerned with the question of whether a judgment entered in default of appearance for a liquidated sum, pursuant to section 70 of the now repealed Judicature (Civil Procedure Code) Act ("the CPC") could include an amount in respect of interest without a claim for interest having been specifically pleaded.

5. To this submission, Mr Piper added another when the parties appeared before us on 2 March 2009, which was that the claim for interest is not maintainable on the further basis that Rule 8.7(3) of the Civil Procedure Rules 2002 ("the CPR") now provides that a claimant who seeks to recover interest must "say so in the claim form" (Rule 8.7(3)(a) and must also provide particulars setting out the basis of the claim, the rate etc. (Rule 8.7(3)(b)). Mr Piper described this as a mandatory procedural rule, the purpose of which is to ensure that a defendant is made aware of what claim is being made against him for interest so that he may plead in response to that claim and lead contrary evidence, if necessary.

6. Dr Barnett on the other hand submitted that the appellant had complied with Rule 8.7(3) "substantially". He pointed out that there was a specific assertion in the counterclaim (at paragraph 118(ii)) that the respondents were in arrears of assessments and interest in "the sum of approximately \$3.7 million at December 2001 when their shares were forfeited, plus interest, costs of ongoing maintenance and all legal costs incurred by their actions and the cost of collecting their arrears" (emphasis supplied). Dr Barnett contended further that the appellant had provided a basis in its pleadings and in the evidence adduced at trial for the claim for interest, sufficient to ground an entitlement to interest, as well as to establish the appropriate rate. Dr Barnett also drew the court's attention to ***Greer v Alstons Engineering Sales and Services Ltd (Trinidad***

and Tobago) [2003] 5 LRC 580 as authority for the proposition that the fact that a claim for interest was not included in the pleadings did not render the court powerless to make an award for interest. The decision in **Long Yong** was, Dr Barnett submitted further, "of limited application."

7. Dr Barnett also submitted that, by virtue of the provisions of the articles, there was a continuing obligation on former members of the company to pay outstanding sums even after their shares had been forfeited, on the basis of a general principle that, when a contract has ended by reason of one party's breach, the innocent party continues to be entitled to the amounts payable to him under the contract, although it may have been discharged by breach (**Chatterton v McLean** [1951] 1 All ER 761).

8. Finally, and in the alternative, Dr Barnett submitted that the appellant was entitled to interest on general principles, "assessed on a commercial basis and at the commercial rates" in reliance on the decisions of this court in **British Caribbean Insurance Company Ltd v Perrier** (1996) 33 JLR 119 and **Motor and General Insurance Company Ltd v Sonny Gobin** (1996) 32 JLR 178). As to the modern attitude of the courts to the entitlement to interest generally, Dr Barnett also referred us to the important recent decision of the House of Lords in **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another** [2007] 3 WLR 354.

9. To take Mr Piper's pleading point first, **Long Yong** was a case in which there was no claim for interest in the plaintiff's claim by specially endorsed writ to recover from the defendant the sum of US\$16,357.19 (the then equivalent of J\$65,428.76). After service of the writ, the plaintiff in due course entered judgment in default of appearance for the sum claimed, with interest at 6% per annum. The defendant successfully applied to the master in chambers to set aside the judgment on the ground that it was bad in law in that it included interest when no claim for interest had been pleaded. The plaintiff's appeal to this court failed, on the basis that the procedure whereby a plaintiff was permitted by section 70 of the CPC to enter judgment in default of appearance on a claim for a liquidated demand with interest at 6% per annum to the date of judgment was only available where a claim for interest had been specifically included.

10. However, the court was careful to distinguish this situation from one in which a plaintiff sought interest pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act ("LRMPA"), in which case, as Carey JA put it (at page 234), "[It is]...plain that an award of interest under the Act does not depend on a claim therefor in the writ." Neither Rowe JA nor Carey JA disputed the authority of **Riches v Westminster Bank Ltd** [1943] 2 All ER 725, a case decided a mere seven years after the enactment of the LRMPA in England in 1934, in which it was held that section 3 did not

require that a claim for interest should be pleaded, or that the statement of claim must say that the plaintiff, if successful, will ask the court to exercise its discretion pursuant to the Act. Indeed Carey JA said this (at page 235):

“So far as we are concerned in this jurisdiction, ***Riches v Westminster Bank Ltd*** is of persuasive authority and consequently, I would incline to the view that in point of law, a claim for an award of interest under the Law Reform (Miscellaneous Provisions) Act 1955 need not be pleaded.”

11. While Carey JA did go on to say that “where a claim for liquidated damages is being made and it is intended to claim interest under the Act, it is desirable that such a claim should be included in the prayer” (page 235), it nevertheless seems to me that, in the light of the fact that this case was primarily concerned with the default procedure under section 70 of the CPC, Dr Barnett's submission that ***Long Yong*** is of “limited application” is entirely correct.

12. The question remains, though, whether the power of the court to award interest under the LRMPA is affected or limited by the provisions of Rule 8.7(3) of the CPR, which are as follows:

“A claimant who is seeking interest must

- (a) say so in the claim form
- (b) include in the claim form or particulars of claim details of -
 - i. the basis of the claim;
 - ii. the rate;
 - iii. the date from which it is claimed;
 - iv. the date to which it is claimed; and

- v. where the claim is for a specified sum of money
- the total amount of the interest claimed to the date of the claim; and
- the daily rate at which interest will accrue after the date of the claim."

13. We were referred by Dr Barnett to the **White Book Service 2006**, where the very similar Rule 16.4(2) of the English Civil Procedure Rules is noted as follows (at paragraph 7.0.10):

"If a claimant is seeking interest he must provide in his particulars of claim the detailed information stated in r. 16.4(2) (see further para. 16.4.2). But in **Greer v Alstons Engineering Sales & Services Ltd** [2003] UK PC 46 it was held that the power to award interest is exercisable whether or not there is a claim for interest in the claim form/ statement of case."

14. **Greer** is a decision of the Privy Council on appeal from Trinidad and Tobago in which a question arose as to whether a claim for interest under a section identical to section 3 of the LRMPA (section 5 of the Supreme Court of Judicature Act, 1962) had to be specifically pleaded. In the judgment of the Board reference was made with apparent approval to a judgment at first instance of Hassanali J in **De Souza v Trinidad Transport Enterprises Ltd and Nanan** (No. 2) (1971)18 WIR 150, 152, in which the learned judge had said that "The discretionary power of the court under the provisions of...the Supreme Court of Judicature Act 1962 is exercisable whether or not there is a claim for interest in the pleadings (**Riches v Westminster Bank** [1943] 2 All ER 725)". Sir Andrew Legatt, who delivered

the judgment of the Board, accordingly concluded (at para. 15) that "the same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded."

15. By 2003 when **Greer** was decided, Rule 16.4(2) of the English Civil Procedure Rules had already been in force for more than five years (very similar rules had in fact also been approved in Trinidad & Tobago in 1998, but did not come into force until 2005 – see Rule 8.5(3) of the Civil Proceedings Rules 1998, which were brought into effect on 16 September 2005 by Legal Notice No. 200 issued on 29 July 2005 by the Rules Committee, pursuant to section 78 of The Supreme Court of Judicature Act). But despite the fact that **Greer** is silent on the impact, if any, of the new rules in England on the broad proposition for which it is cited as authority by the editors of the **White Book Service 2006**, it does provide support for what in my view must be the position in the light of the clear and unrestricted provision of section 3 of the LRMPA. That is, that while a claim for interest must generally be pleaded as required by the rules, there is no need to plead a claim for interest pursuant to the LRMPA, on the continuing authority of cases like **Riches v Westminster Bank Ltd**, **De Souza v Trinidad and Tobago Enterprises**, **Long Yong**, and now **Greer**.

16. In so far as the claim to recover the outstanding assessments is concerned, it will be recalled that Sykes J had made a specific finding

that the respondents had "...failed to show that the estimated costs of operating and maintaining the villas and grounds...to the standard of [a] first class resort hotel for the years 1994 - 2001 were excessive" (paragraph 85). The judge also found specifically that the appellant was "entitled to recover the loans, interest [sic] on the loans and costs of acquiring the loan[s] that were used to maintain the property since these obligations were incurred to enable [the appellant] to fulfil its responsibilities under the lease, that is, to maintain the property at the standard of a first class hotel" (paragraph 154). It is clear that were it not for his conclusion that these costs were required by the articles to be shared equally by all shareholders and not only by the smaller group of shareholders who were also leaseholders, he would have adjudged the respondents to be liable to pay the assessments for the purpose of maintaining the villas, plus interest to the date of forfeiture.

17. I agree with Dr Barnett that the appellant's pleaded counterclaim complied in substance with Rule 8.7(3) by referring to the claim for interest (in paragraph 118(ii)), by stating the basis of entitlement (to enable recovery of interest costs incurred by reason of the failure of some shareholders/lessees to pay assessments), the rate (that charged to the appellant by its creditors) and substantially all of the other relevant matters referred to in the rules. I also agree with Dr Barnett's submission that the trial proceeded on the basis that interest was being claimed by

the appellant as a consequence of the fact that bank interest charges were incurred by the company by reason of the failure of some of the shareholders/lessees to pay the assessments. I therefore think that the appellant's claim to recover the outstanding assessments plus interest to the date of forfeiture was fully supported by its pleaded case, the evidence adduced and by the findings (not challenged on appeal) of the trial judge. It also seems clear from his findings that, had Sykes J not considered himself to be constrained by the provisions of the articles, there would have been no obstacle to his giving judgment on the counterclaim and making an award of interest.

18. But in any event I do not understand Mr Piper to challenge the interest component of the claim for \$3,658,375.05: his main contention is that there is no claim for interest on this amount ("a liquidated sum") and that the appellant is not therefore entitled to an award of interest on it. I have already expressed the view that the power of the court to make such an award is not dependent on the pleadings and the question which therefore remains is whether and on what basis this court should make an award of interest in the circumstances of this case.

19. At paragraph 60 of my judgment on the substantive issues in this appeal, I had expressed the view that, the respondents' shares having been forfeited, interest would "...fall to be assessed in accordance with general principles and not pursuant to article 91(3), by which the

respondents would no longer be bound as members of the company after the date of forfeiture". In so saying, I intended to convey only that, after forfeiture, the mechanism set out in article 91(3), whereby the determination of the rate and basis of computation of interest payable by members of the company on overdue assessments is a matter for the appellant's Board of Directors, would no longer be appropriate. This does not of course foreclose reliance on the articles if the principle on which interest is to be assessed in these circumstances can be derived from them.

20. However, despite Dr Barnett's very interesting argument on the continuing obligation of the respondents as former members of the company, I do not think it necessary to make any pronouncement on this in the light of the view to which I have come that the appellant is plainly entitled to an award of interest under the provisions of section 3 of the LRMPA, which was in any event the alternative basis put forward by Dr Barnett.

21. In ***Sempra Metals Ltd v IRC*** (supra), Lord Hope of Craighead said this (at page 363):

"The reality is that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest."

Although the House of Lords was in that case primarily concerned with the court's jurisdiction to award compound interest on a restitutionary claim and to award interest, simple and compound, on damages on claims for non-payment of debts as well as on other claims for breach of contract, Lord Hope's statement is, it seems to me, equally relevant in principle in the circumstances of the instant case. For, as the judge found, the appellant was in fact obliged, in order to supply the deficiency created by the non-payment of assessments when due by the respondents and others, to resort to borrowing to maintain the facilities of the property to the required standard. It therefore seems to me that this is clearly a fit case for an award of interest in the court's statutory discretion.

22. As to the rate of interest, Dr Barnett invited us to apply the rate of 15% per annum to the United States dollar equivalent of the arrears, on the basis that Sykes J had upheld the validity of the loan in that currency and at that rate which on the appellant's case it had been obliged to obtain to meet the expense of the property. In the alternative, Dr Barnett submitted that interest should be assessed on a commercial basis and at commercial rates as expressly sanctioned by this court in **British Caribbean Insurance Company Ltd v Perrier** (supra). While Dr Barnett's instructing attorneys-at-law very helpfully provided calculations based on both alternatives, I prefer the simplicity of a modified version of the second (the first involves the further complication of having to take into account the

rate of devaluation of the Jamaican to the United States dollar over the period between forfeiture of the shares and the date of judgment), that is, to take an average of the commercial banks' weighted loan rates over the period 23 December 2001 to 6 November 2006. Applying the interest rate data supplied by the appellant (which were not challenged by the respondents), I make the average interest rate per annum on this basis for the period to be 14.68%.

23. I would accordingly award simple interest (the only basis permitted by the statute) on the sum of \$3,658,375.05 at 14.68% per annum from 23 December 2001 to 6 November 2006.

DUKHARAN, J.A.:

I agree.

SMITH, J.A.:

ORDER:

Simple interest is hereby awarded on the sum of \$3,658,375.05 at 14.68% per annum from 23 October, 2001 to 6 November, 2006.